1953

Utah Cooperative Association v. White Distributing & Supply Co et al : Supplemental Brief of Plaintiff and Respondent

Utah Supreme Court

Gaylen S. Young; Gaylen S. Young, Jr.; Attorneys for Plaintiff and Respondent;

IN THE

SUPREME COURT

OF THE

STATE OF UTAH

UTAH COOPERATIVE ASSOCIATION,
Plaintiff and Respondent,

vs.

WHITE DISTRIBUTING & SUPPLY CO., a corporation, VERDI R. WHITE (appellant); E. R. WHITE: GORDAN P. AUSTIN: ANNELL AUSTIN: E. B. McCABE: MARY S. McCABE,
Defendants.

Case No. 7627

SUPPLEMENTAL BRIEF OF PLAINTIFF AND RESPONDENT

The facts were previously set out in respondent's brief at pages 3, 4 and 5, but for the convenience of the court, I set them forth again as follows:

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FACTS

January 25, 1948, the Plaintiff recovered a judgment in the District Court of Salt Lake County against the defendant White Distributing & Supply Company for $1,212.98 and $12.00 costs for nails purchased on open account (R. 1,25 and 26). The defendant, Verdi R. White, as president and manager of the said White Distributing & Supply Company, in that case, was called into court on an order in aid of supplemental proceedings. On a second hearing on those proceedings before the Honorable Clarence E. Baker, as judge, held January 6, 1949, (the files show 1950, but it should be 1949) the said Verdi White admitted said White Distributing & Supply Company was insolvent. It owed $100,000.00 to $125,000.00 (R. 49). The only property of any value discovered on those proceedings was an equitable interest in the real property described in the complaint at 3149 South State Street, Salt Lake City, Utah. Mr. White, as president and manager of the company had used company funds to construct a building on the said property at 3149 South State Street. Said Verdi R. White personally owned an undivided one-half interest in an Uniform Real Estate Contract of purchase of said property — a buyer's equity. One Austin had the other half. He testified in those proceedings that his company with its own funds built the building on said property and that the corporation spent about $4,600.00 constructing it. The question was put to Mr. White:

"Q. How much approximately did the corporation spend putting the building up?"

"A. Approximately $4,600.00."

"Q. And so you would say that that would be the interest of the corporation in that property?"

"A. Yes." (R. 31 & 32).

Those supplemental proceedings having revealed that the judgment debtor had an interest in the said State Street property, a suit was on May 4th, 1949, filed by the Plaintiff to have a judicial finding and determination of the interest of the White Distributing & Supply Company in said real property. Judge Jeppson found and decreed, among other things, that:

> "Defendant, Verdi R. White has an undivided one-half interest in said buyer's equity in and to said real property described above, subject, however, to an interest of $4,600.00 in said undivided one-half interest in said buyer's equity in favor of, and owned by, the Defendant, White Distributing & Supply Company, a corporation."

From that judgment, the defendant, Verdi R. White, served and filed notice that he "will appeal." (R. 75).

ARGUMENT

In this supplemental brief, respondent wishes to answer the various points argued in appellant's Petition for Rehearing as follows:

POINT I

THIS COURT HAS ERRED IN HOLDING THAT THE WHITE DISTRIBUTING AND SUPPLY COMPANY HAD ANY INTEREST IN THE REAL PROPERTY OF THE AP-

PELLANT AND IN SO HOLDING THIS COURT HAS DETERMINED TO BE UNTRUE THAT WHICH WAS STIPUTED TO BE TRUE BY ALL THE PARTIES."

At the outset appellant's arguments are all vague and uncertain. They lead only to confusion.

In the supplemental proceedings it was clearly and emphatically brought out that the White Distributing & Supply Company, a corporation, had a very real interest in the property on South State Street (R. 32). The questions asked at said proceedings were simple and clear. The appellant, Verdi White, being the president and manager of said corporation, which was engulfed in no small enterprise, but to the contrary was engaged in about a million dollar's worth of construction (R. 40), should have realized and certainly did understand, the meaning of his answers and the purpose for which he was brought in for interrogation. If at any time there was reason for telling the truth and explaining the situation as to the corporation's interests it was at this particular supplemental proceedings. Woodrow D. White, his counsel, knew the purpose was to find out what property and interests the corporation had. If it were a fact that the $4,600.00 was a debt, and not an interest in the property, why did not appellant's counsel call it to the intention of Judge Baker at the proceeding. If it was a debt and the debt had been offset by payments on corporation debts as claimed, why did appellant let the answers stand? The plain fact is, as can easily be inferred from the record, when the corporation erected the building it was a big con-

cern and operating on a large scale, and the purpose at that time was that the corporation was to take over the property, shown as follows:

1. A million dollar concern (R. 40).

2. It had no place for its office until the building was constructed (R. 40).

3. Corporate owned materials went into the building. Appellant paid for some of it for the corporation as its manager (R. 42, 43 & 44).

4. No written lease was introduced to show any rental arrangement.

5. The rental which Mr. White said was to be paid was uncertain when he said "approximately" — "of $195.00 per month." (R. 41)

6. The corporation moved in and took charge of the property collecting all the rentals and paying the $135.00 on the purchase contract from the McCabes. (R. 41)

7. Although there is some mention of a rental arrangement it is vague from the record whether that be true. No payments were made (R. 44). Only oral testimony was given to show any credit was given.

8. Whatever arrangement was made for the corporation to occupy the premises it still stands out in bold relief from the evidence of appellant in the supplemental proceedings that the corporation has a $4,600.00 interest.

9. The record does not show the corporation ever filed a lien to protect its interest in this so called debt of $4,600.00. Had it been a debt, and not an actual equitable interest, that certainly would have been done. Mr. White and his learned counsel would not have passed up that protection unless they had a deliberate intention to defraud the corporation or its creditors.

Counsel says in his brief that the testimony of Verdi White against his interest "was nothing more than an expression of opinion and a mistaken legal conclusion of a layman". Who would be in a better position to represent the interests of the corporation than its president and general manager? He knew and his counsel knew he was not being called into court to give an opinion but was called to give facts. The statement he made was an actual fact — a conclusion of fact. He had over a year and nine months between the supplemental proceedings and the trial in this action in which he and his counsel had the opportunity to reflect and consider a way to defeat the collection of the judgment out of the property.

Counsel argues the corporation had no interest in the property because appellant paid some debts. It is not clear from the record when the alleged debts were paid. If they were paid it was no doubt long before the supplemental proceedings because the corporation became defunct in about October 1947 and the said proceedings were not had until January 1949 or a year and 3 months after. If he paid them it was no doubt to

protect his own interest, otherwise, no doubt, liens would have been filed. This had nothing to do with the $4,600.00 interest the corporation had.

Counsel says 42 lots at $600.00 a lot were conveyed to corporate creditors following a meeting in October or November, 1947. Again this has nothing to do with Mr. White's statement a year and 2 months later that the corporation owned an interest of $4,600.00 in property. He did not say the interest was as of November 1947, but it was of January, 1949.

Counsel tries to make something of a stipulation that respondent made in the trial. Although the matter, we believe, is not in anyway material here, we feel, in order that the court be not misled, the matter should be clarified. Verdi White testified that he had conveyed the 42 lots above mentioned and his counsel wanted respondent to stipulate to that as being a fact. Counsel refused to do so but did stipulate as follows:

> "I will stipulate that the records will show, if Mr. White says so — I think he is honest — that *his brother deeded* some property to *some* of the creditors, that the record will show. As I want to say, I want to make it clear, we are not admitting its materiality in any way." (R. 59)

Counsel says "this stipulation shows that the appellant paid creditors' claims of the White Distributing & Supply Company in the amount of $25,200.00". The stipulation shows no such fact as is seen. We do know that Verdi White's brother deeded some property to

some creditors. We further know that none of the property was deeded to respondent and we fail to see the materiality it has in this action. If Mr. White has paid any corporate debts out of his own funds where he was not obligated to do so, it is very commendable of him. It would be interesting to note just how many of these debts were paid where he was not legally obligated. We have already stated the probability for his paying some debts was to avoid liens on property he had some interest in. It would appear that several items shown on Exhibit I which he claims were paid he was liable on anyway. It would be noted the release is not given just to the corporation, but to E. C. White, V. R. White (the appellant), V. J. Wimmer, Stewart B. Jardine and G. P. Austin. No doubt all these individuals were on the $7,000.00 bond to Salt Lake City. Perhaps if the facts were known, he would have been personally liable on the Barchlow mortgage too. It was not introduced in evidence. It is quite common for lenders to secure the individual signatures on notes and mortgages when lending money to corporations. Mr. White has the burden of proving (if it be material) that he paid the debts where he was not personally liable. It is all very vague. The 42 lots belonged to appellant's brother. Who knows but what his brother was obligated to the corporation in some form. It is not natural for a person owning only a one-fourth interest in a corporation to pay $31,500.00 on corporation debts where he is not personally liable. He would have to give more proof than is in the record to satisfy any

reasonable mind that any money he might have paid on corporation debts was not to protect himself in something. We doubt the emotional appeal made by appellant on this point is entirely justified.

Counsel complains that "Gordon Austin — paid nothing on corporate debts and yet Austin retains his half interest in the State Street property without the burden of respondent's judgment affecting his title." He well knows that Austin was made a party to this action but proved he had no interest, having assigned to one Strand who was not available. So the judgment attaches to the interest of the appellant who was before the court.

POINT II

"THIS COURT HAS ERRED IN HOLDING THAT A JUDGMENT CREDITOR OF A FORMER LESSEE HAS A GREATER INTEREST IN THE REAL PROPERTY OF ANOTHER THAN THAT OF THE JUDGMENT DEBTOR."

As to this point argued in appellant's petition, we must bear in mind that this action was merely to have an equitable determination as to the nature and extent of the interest of the defendants, in the real property in question.

The court found that defendant Verdi R. White had an undivided one-half interest and that White Distributing & Supply Company owned an interest to the extent of $4,600.00 in said real property. The court concluded, based on the finding that White was president and manager and in charge of the finances and all opera-

tions of the corporation and as such caused $4,600.00 of its funds to be expended for erecting the building and knowing that said funds were being used for such structure and affirmatively recognizing said corporation had an interest in the real property to that amount, that White's interest was subject to the $4,600.00 interest of the defendant corporation. Section 104-30-15 of the Utah Code Annotated 1943 gives a judgment creditor a lien upon all real property owned by the judgment debtor. Under the evidence as determined by the trial court the White Distributing & Supply Company owned a $4,600.00 interest in the property which was an actual equitable interest. Under such circumstances a statutory lien attaches.

Counsel refers to earth-shaking complications. I am sure he knows that one who may be an innocent purchaser for value without notice has a priority over one who fails to make his claims known. That question is not involved in this case. Notice of the claimed judgment lien was filed and recorded in the County Recorders Office December 17th, 1948. Thus appellant and White Distributing & Supply Company knew several weeks before the supplemental proceedings that respondent claimed the corporation had a substantial equitable interest in the real estate in question. (Exhibit "A"). So as a matter of fact, Mr. White was not taken by surprise when he was asked the extent of the interest of White Distributing & Supply Company in that property in the supplemental proceedings.

The judgment of the District Court was unanimously affirmed by this court on October 31, 1951. Considerably more than a year has passed since the decision was handed down and no new light has been shed on the case in appellant's petition for rehearing.

Points 3 and 4 of appellant's petition have been answered above.

CONCLUSION

We believe the court properly decided this matter in the first instance. Surely this court will not permit Mr. White to repudiate the testimony he deliberately gave in the presence of his learned counsel at the supplemental proceedings.

Plaintiff again submits that the appeal should be dismissed and the judgment of the District Court should be affirmed with costs to respondent.

Respectfully submitted,

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